

(319)

Superior Court
Barnstable, ss

Filed MAY 15 2019

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, ss

SUPERIOR COURT

Clerk

0572-109

COMMONWEALTH

v.

CHRISTOPHER MCCOWEN

COMMONWEALTH'S OPPOSITION
TO THE DEFENDANT'S FOURTH MOTION FOR A NEW TRIAL

Now comes the Commonwealth, through its District Attorney Michael O'Keefe, and moves this Honorable Court to deny the defendant's Fourth Motion for a New Trial, for the reasons stated in the memorandum. For reasons therefore, the Commonwealth states that the defendant cannot establish that justice was not done, per Mass. R. Crim. P. 30(c). The defendant asserts that a new trial is warranted where he alleges an Alternate Juror participated in deliberations. To support his claim, he relies on unsworn statements by the alternate juror to a national media outlet for a television and podcast special. The defendant's memorandum lacks any evidentiary support, and there is no sworn statement by Juror Lyon- only links to a television special and podcast. This Court should note the lack of an affidavit from Alternate Juror Lyon. In his latest motion for a new trial, the defendant is simply relying on unsworn statements made to the media for a television show.

I. NO EVIDENTIARY HEARING IS WARRANTED WHERE THE DEFENDANT HAS NOT RAISED A SUBSTANTIAL ISSUE.

The decision whether to grant an evidentiary hearing on a motion for a new trial rests in the sound discretion of the judge. The court may rule on the issues presented by the motion on the basis of the facts as alleged in the filings without a hearing if no substantial issue is raised by the motion or affidavits. *Commonwealth v. Licata*, 412 Mass. 654, 660 (1992).

In order to be entitled to a hearing, a defendant must raise a substantial issue and provide an adequate factual showing supporting his position. See *Commonwealth v. DeVincent*, 421 Mass. 64, 67 (1995). For the reasons stated in Issue II, *infra*, the defendant has not raised a substantial issue, nor has he made an adequate factual showing. He has not provided any sworn statements from the alternate juror, and there is no evidence that the juror participated in the deliberations. The defendant relies on an ABC TV show and podcast. The defendant's motion does not include specific statements with corresponding time stamps.

As there are no substantial issues warranting a hearing, for the reasons discussed in the Commonwealth's memorandum *infra*, the defendant's motion should be denied without a hearing. *Commonwealth v. Denis*, 442 Mass. 617, 628 (2004). The

motion can be denied on the papers, neither an evidentiary hearing nor a non-evidentiary hearing are warranted.

III. THE DEFENDANT CANNOT ESTABLISH THAT JUROR LYON COMMITTED PERJURY WHERE HE HAS NOT OFFERED ANY EVIDENCE THE DEFENDANT PARTICIPATED IN THE JURY DELIBERATIONS.

The defendant has not established that Alternate Juror Lyon, participated in the deliberations. Alternate Juror Lyon testified on January 11, 2008, at the hearing on the defendant's first motion for a new trial. He testified that he was an alternate juror in this case. (A/2) He testified that he never deliberated in the jury room. (A/2) He testified that he did not discuss his views about the case with his fellow jurors, from the moment that he was selected as an alternate to the time the verdict was announced. (A/2) He testified that he never sent a message into the jury room about the case. (A/2)

Judge Nickerson, both the motion and trial judge, held that "[t]he three affidavits raised the prospect of the deliberating jurors discussing their progress with Juror Lyon, the alternate juror. The court's inquiry focused on whether Juror Lyon discussed his analysis of the evidence with the deliberating jurors, thereby infecting the verdict by outside influence. The jurors were unanimous that that did not occur." (B/20)

The defendant did not challenge Nickerson, J.'s on appeal to the Supreme Judicial Court. The Court noted, "the motion judge treated the defendant's motion as, in substance, a motion for a new trial. The motion also alleged that one of the

alternate jurors had participated in, and impermissibly influenced, the jury deliberations. On appeal, the defendant does not challenge the judge's finding that there was no factual basis to support his allegation." *Commonwealth v. McCowen*, 458 Mass. 461, 491 fn. 28 (2010).

The defendant challenges Juror Lyon's testimony at the motion for a new trial solely on statements that he gave to ABC for a podcast and television special on the defendant's trial called "A Killing on the Cape." The defendant has not provided any sworn statement from the juror. The defendant has provided a thumb drive of the television special and podcasts.

The defendant provided links and a thumb drive to watch the ABC television show and listen to the podcast. The defendant did not provide any citations or time stamps as to where the alleged statements by Juror Lyon are located. The Commonwealth watched the ABC television special and listened to the podcast.¹ By the Commonwealth's account and review of the supplemental material, Juror Lyon made the following statements.

¹ The Commonwealth's citations are to the time stamps for the audio and video submitted by the defendant on the thumb drive. The Commonwealth notes that it only heard three statements by Juror Robert Lyon in the 20/20 ABC Show. Episode 5 of the podcast was the only episode that plays clips from Juror Lyon's interview. The defendant did not provide timestamps or citations to where Juror Lyon spoke, therefore, the Commonwealth is relying on its review of the television and podcast.

ABC 20/20:

Robert Lyon: Race did not play a part at all in deciding McCowen's guilt. It had no effect on the verdict. There's just no way around the DNA. (1:22)

EPISODE 5 PODCAST

RL: The photos were very graphic. (8:39)

Narrator: Robert Lyon was an alternate juror during Chris McCowen's trial.

RL: They added a certain gravity to the case that you didn't necessarily . . . The idea of it is one thing in your brain and I think those photos helped us to get the reality of the crime scene, to get the reality of a murder was committed. (8:50)

Narrator: Finally, the statement ends with Chris saying it was Jeremy who stabbed Christa. Juror Robert Lyon. (10:50)

RL: Robert Welsh, the prosecutor, was very straightforward in presenting the case and he did an excellent job in giving us the facts as best he could. The defense attorney was really a character I thought. (11:00)

Narrator: Other jurors, meanwhile, like Robert Lyon, who's a middle-aged man, sharply dressed with thick glasses and a bow tie, says race simply didn't play a role in their decision. (41:00)

RL: Race did not play a part at all in deciding Christopher McCowen's guilt or innocence. It had no effect on the verdict. (41:12)

Narrator: For Robert, he says the crux of the Commonwealth's case, Chris's various accounts and the DNA match, were crucial. (41:10)

RL: One of Bob George's defense strategies was to say that he, Christopher McCowen, came in on Thursday, had consensual sex with her, left, someone else came in and committed the crime. This did not line up with Christopher McCowen's interrogations that he had with the state police. There were a number of interrogations where he gave different versions of what happened. None of them said, "I was there on Thursday and never came back." All of them said, in some version or another, that he was there when the crime happened. The DNA was very pivotal in the case, there's just no way around the DNA. The DNA put Christopher McCowen at the crime scene. It put an approximate

time he was there at the crime scene and there's no altering that. (41:29)

RL: Christopher McCowen is the man who committed the murder. There is absolutely no evidence that anyone else did it. The trial was 10 years ago and time has not altered, at all, my conviction about his guilt. I still believe as strongly as I did then that he was the man who committed the crime. (43:59)

Counsel's loose marshaling of the podcast and television special does not amount to any credible indication that Juror Lyon engaged in any premature jury deliberations.

The statements by Juror Lyon to the news media do not state that he participated in deliberations. This court must note the lack of credibility and reliability, in "light of the fact that the statement by [Juror Robert] is unsworn and lacking in any other indicia of reliability." *Commonwealth v. Raymond*, 424 Mass. 382, 397 (1997); *Commonwealth v. Tobin*, 392 Mass. 604, 620 (1984). The statements are those of an alternate juror to a national media outlet for a television and podcast special. The judge has the discretion to discredit any unsworn statements.

As listed above, none of the statements assert that Alternate Juror Lyon participated in the jury deliberations. None of the statements even suggest that the juror committed perjury at the post-verdict jury evidentiary hearing held by Nickerson, J. Alternate Juror Lyon talks about his interpretation of the evidence, his opinion, as he sat through the entire trial, and wanted to share it with the media for a

podcast and national news special. The defendant does not make any equivocal statements that he participated in the deliberations, nor does he offer any suggestion that he participated in the deliberations.

The evidence in support of the defendant's motion is virtually nonexistent. The defendant has not provided any sworn statements by the juror. The statements are in the form of a podcast and television special.

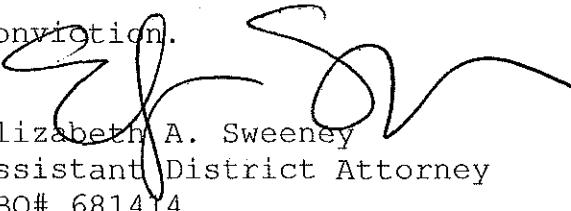
The juror's statements are summarized as *his opinion* on the graphic photos of the crime scene, *his opinion* of the ability of both the prosecutor and defense attorney, *his opinion* of the allegation of racial bias, *his opinion* of the strength of the case, and *his opinion* of the multiple post-conviction motions. (emphasis added)

The defendant is not entitled to an additional hearing to determine if there was juror misconduct, *Commonwealth v. Fidler*, 377 Mass. 192 (1979). The defendant already had a hearing on alleged juror improprieties. The defendant's latest showing that Alternate Juror Lyon participated in deliberations is nonexistent. The defendant cannot point to when the jurors engaged in improper deliberations, he has not provided a statement by Alternate Juror Lyon that indicates the jurors were involved in improper discussions, nor can he point to any extraneous influence.

Lastly, if the defendant attempts to file a supplemental affidavit by any individual after the filing of this motion, the claims are waived. This issue was addressed in *Commonwealth v. Pingaro*, 44 Mass. App. Ct. 41, fn.4 (1997). In *Pingaro*, The Commonwealth asked the judge to ignore the criticisms of counsel raised in *Pingaro's* belated supplementary affidavit on the ground that they essentially constituted new grounds for relief that were waived by *Pingaro's* failure to have included them in his original motion. See Mass.R.Crim.P. 30(c)(2), 378 Mass. 901 (1979). Therefore, any attempt by counsel to include statements from the media, or additional statements by Juror Lyon should be waived, and any additional claims to this motion for a new trial are waived, where they were made after the Commonwealth noted the serious deficiencies in the defendant's filings.

CONCLUSION

The Commonwealth respectfully requests this Honorable Court deny the defendant's Motion for a New Trial without an evidentiary hearing and affirm his conviction.


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COMMONWEALTH OF MASSACHUSETTS

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Appellee

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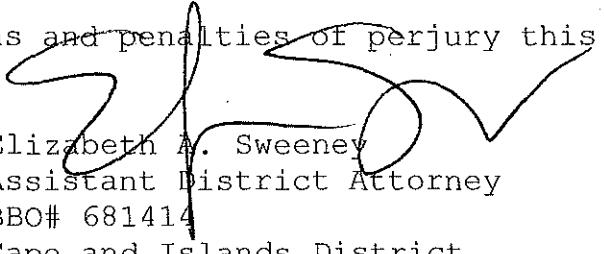
CHRISTOPHER MCCOWEN,
Defendant-Appellant

CERTIFICATE OF SERVICE

I, Elizabeth A. Sweeney, Assistant District Attorney for the Cape and Islands District, hereby certify that I have served a copy of the Commonwealth's Opposition to the Defendant's Fourth Motion for a New Trial and Supporting Exhibits to the Barnstable Superior Court, Criminal Business, and a copy to defense counsel:

Gary Pelletier, Esq.
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Signed under the pains and penalties of perjury this 15th day of May, 2019.


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